

- (1) Did claimant meet with personal injury by accident on the dates alleged?

- (2) Did claimant's accidental injuries arise out of and in the course of his employment with respondent?
- (3) Did claimant provide timely notice of the alleged accidents in February 1998, for a series of accidents occurring through February of 2001 and for specific injuries occurring in February 2001?
- (4) What were claimant's average weekly wages for the alleged injuries and the specific injury dates?
- (5) Is claimant entitled to reimbursement for medical treatment provided in the amount of \$14,495.29?
- (6) Did claimant file timely application for hearing and make a timely written claim with regard to his alleged accidental injury in February 1998 or is that claim barred by the statute of limitations?
- (7) Did claimant file a timely application for hearing and make a timely written claim with regard to the accidents alleged either in February 2001 or for a series of accidents occurring through February 12 and 13 of 2001?
- (8) Is claimant entitled to unauthorized medical treatment?
- (9) What is the nature and extent of claimant's injuries and disabilities for the alleged injuries claimed?

The parties have requested that should the Board determine that the ALJ should be reversed on any of the above issues, thereby resurrecting claimant's claims, the matter should be remanded to the ALJ for a determination of the issues not originally determined in the Award.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board makes the following findings of fact and conclusions of law:

Claimant was working for respondent in March 1998 when, while he and a helper were throwing a hot water heater into the back of a truck, claimant heard a snap in his back. The next day, claimant experienced severe back pain. He went to Bethany Hospital, underwent x-rays and was advised that he had degenerative disc disease at L-2 and L-3. This information came from claimant's family doctor, Stephen M. Cicero, D.O. Claimant appeared at Dr. Cicero's office on March 27, 1998, with complaints of back spasms and low back pain. Claimant stated that he had injured his back at work.

Claimant advised James A. Kiekel, the president of respondent company, that he had suffered an injury in March 1998. Mr. Kiekel acknowledged that he was aware of claimant's injury because claimant filed a workers compensation claim through respondent's workers compensation insurance carrier, and benefits were paid in 1998. At that time, claimant went to Bethany Hospital for x-rays and was advised that he had suffered a back injury. Claimant initially thought that he was suffering from kidney stones. Claimant then turned the information into the workers compensation carrier, and benefits were provided. Claimant continued working for respondent, as Mr. Kiekel was willing to provide accommodated work. Claimant acknowledged that Mr. Kiekel was willing to work around claimant's limitations at that time. Claimant's medical bills for this injury were paid through the workers compensation insurance carrier.

Claimant's history is significant as he began receiving chiropractic care for his low back as early as 1994 with James C. Anderson, D.C. However, claimant testified that those ongoing intermittent problems were only minor and from 1994 to 1998, he did not see Dr. Anderson on a regular basis.

After being provided medical treatment for the March 1998 injury, which claimant testified lasted for approximately four weeks, his back difficulties settled down to simply a mild pain, instead of the severe pain he originally experienced. He acknowledged he continued having some good and some bad days. Claimant continued working for respondent without restriction until February 12, 2001. On that date, claimant was working at Wagner Auto Body, changing a blower motor on a furnace. Claimant testified that after performing that duty, he was very sore from performing the job. The next day, on February 13, 2001, claimant was working on the rooftop of KU Med Psychiatric Unit building. While moving a ladder in the snow, claimant testified that he was having difficulties with his back, describing his back as being really sore.

The next morning, February 14, 2001, claimant went to the doctor, suffering from flu-like symptoms. Claimant testified that that evening, he began experiencing significant back problems. On the morning of February 15, 2001, claimant was unable to get out of bed. He returned to Dr. Anderson, who advised him that his back was significantly worse and that claimant should undergo an MRI. Claimant then contacted Dr. Cicero, who also recommended the MRI. Claimant saw Dr. Cicero on February 19, 2001, at which time claimant's flu symptoms had improved, but his back complaints continued. Claimant was advised that the MRI showed a left anterolateral extradural defect consistent with spurs versus disc protrusion at L2-L3.

Claimant was advised on March 2, 2001, during his visit with Dr. Cicero, that his condition was a work-related injury and that he should speak to his employer about the condition. Claimant was referred to Charles M. Striebinger, M.D., and claimant initially saw him on April 3, 2001. On May 21, 2001, claimant underwent a lumbar myelogram and surgery involving a lumbar laminectomy, with disc removal and spinal fusion at L2-3 and L3-4.

Claimant contacted Mr. Kiekel on February 14, 2001, stating that he was sick with the flu. Mr. Kiekel testified that claimant then called back two days later saying that the flu was better, but that his back was hurting and that he was having difficulty getting out of bed. February 14, 2001 was the first day that claimant actually missed work for his ongoing back problems from that injury. Claimant then contacted Mr. Kiekel three or four days later, advising him that he was having problems with his back and was going to see a back doctor. Mr. Kiekel testified that as of that point, claimant had not advised of a work-related accident. At some point, he is not sure what day it was, Mr. Kiekel was advised that this was a work-related injury. Mr. Kiekel then contacted respondent's workers compensation insurance carrier, advising them that claimant was off work and was going to see a doctor.

Claimant underwent a telephone interview with an insurance representative from the workers compensation insurance company on March 14, 2001, which Mr. Kiekel acknowledged indicated that the insurance company had been contacted sometime prior to March 14, 2001.

Claimant filed an E-1 Application for Hearing with the Workers Compensation Division on May 9, 2001, alleging injuries in February of 1998 and again on February 12, 2001. The February 1998 and February 14, 2001 dates of accidents were submitted by claimant at the time of regular hearing. No modifications of those alleged dates of accidents were ever provided by claimant to the Workers Compensation Division.

In the Award, the ALJ decided the issues dealing with timely notice, timely written claim and timely application for hearing. However, there was no discussion regarding whether claimant suffered accidental injury on the dates alleged or whether those injuries arose out of and in the course of employment.

With regard to whether claimant suffered accidental injury in 1998, claimant testified to a specific incident in February 1998, when he was throwing a hot water heater into the back of a truck. Claimant testified he heard a snap in his back and the next day had severe back pain. When this was reported to Mr. Kiekel, the owner of respondent, claimant was sent to the doctor at Occupational Health and provided medical treatment. Claimant continued working for respondent during this period of time, and the condition ultimately resolved to the point where claimant was capable of continuing his regular duty, although claimant acknowledged occasional mild pain complaints, with some days better and some days worse.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

In this instance, claimant's testimony regarding how the accident occurred in March 1998 is uncontradicted. Additionally, respondent's owner, Mr. Kiekel, acknowledges that he was advised of the incident and workers compensation benefits were provided. The Board finds that claimant has proven that he suffered accidental injury in either February or March 1998 and that this injury arose out of and in the course of his employment with respondent.

Both claimant's and Mr. Kiekel's testimonies then become unclear with regard to what, if any, notice was provided. Claimant testified he provided notice to Mr. Kiekel and was provided workers compensation benefits. Mr. Kiekel acknowledged that claimant advised him of the condition and benefits were provided, but testified that he believed the injury occurred in July of 1998. It was shortly after he was advised of the accident and the injury that Mr. Kiekel referred claimant for workers compensation benefits and those benefits were provided through respondent's workers compensation insurance carrier. The medical reports of Dr. Cicero indicate that claimant appeared in his office on March 27, 1998, advising of a trip to the emergency room at Bethany Hospital on March 25, 1998, after suffering a work-related injury. Claimant was excused from work at that time, from March 25 to March 31, 1998, due to those ongoing injuries. The Board finds the testimony of claimant, coupled with that of Dr. Cicero, to be persuasive and finds that claimant suffered accidental injury in either February or March 1998, with notice being provided to Mr. Kiekel shortly thereafter. The Board finds that claimant's notice was timely and reverses the ALJ's determination that claimant failed to provide timely notice of accident for the March 1998 accidental injury.

Respondent, however, contends that claimant's written claim and application for hearing were not timely for the 1998 injury. K.S.A. 44-520a (Furse 1993) requires the employer be provided written claim for compensation within 200 days of the accident or last payment of benefits. K.S.A. 44-534 (Furse 1993) requires an application for hearing be filed with the Director within three years of the date of accident or within two years of the last payment of benefits. The only evidence of any medical treatment in this case indicates that claimant's benefits were provided for approximately four weeks, sometime between March 1998 and July 1998. As claimant's written claim and application for hearing were not filed until May of 2001, this would both exceed the written claim time allowed under K.S.A. 44-520a (Furse 1993) and the timely application for hearing time limit set forth in K.S.A. 44-534 (Furse 1993). The Board, therefore, finds for the February or March 1998 injury, that claimant had failed to satisfy the demands of the above statutes and the ALJ's determination that claimant should be denied benefits for the March 1998 injury, for those reasons, is affirmed.

Claimant contends that he suffered a series of accidents beginning in 1998 and continuing through his February date of accident in 2001. However, claimant's E-1 alleges only a February 14, 2001 date, which was amended to February 12, 2001. Claimant did not allege a series of accidents through those last dates. Additionally, at regular hearing, it was alleged that claimant suffered accidental injury in February 1998 and on

February 14, 2001. Again, there were no allegations of a series of accidents submitted at that time. Claimant's failure to amend his date of accident precludes the Board from accepting claimant's argument that he suffered a series of accidents beginning in 1998 and continuing through his last day worked, February 13, 2001.

Claimant did testify to specific incidents occurring both on February 12 and February 13, 2001. On February 12, claimant was working at Wagner Auto Body, performing heavy lifting while changing the blower motor on a furnace. Claimant testified that his back was very sore that night from doing that heavy lifting. The next day, on February 13, claimant was working on the rooftop at the KU Med Psychiatric Unit building. It had snowed and was slippery, and claimant was forced to carry ladders and climb from one level to another while performing work on the roof. Claimant testified his back was also sore on that day. The Board finds that claimant did prove that he suffered accidental injury on February 12 and February 13, 2001, with those accidental injuries arising out of and in the course of his employment with respondent.

Claimant did not provide notice of accidental injury to respondent until shortly before March 14, 2001. It was on that date that claimant was contacted by respondent's workers compensation insurance carrier and provided a telephone interview with the insurance agent. Mr. Kiekel acknowledged that he contacted the insurance company prior to March 14, 2001, providing them with the information regarding claimant's workers compensation claim.

K.S.A. 44-520 requires that notice of accident be provided to the employer within ten days of the accident. Claimant has not provided information to establish that his notice to respondent was within the ten-day time frame set forth by statute.

However, K.S.A. 44-520 goes on to state that the ten-day notice provision will not bar any proceeding for compensation under the Workers Compensation Act if the claimant can prove that failure to notify under this section was "due to just cause . . . ." If claimant provides just cause for his failure to timely notify respondent of the accident, then the notice requirements under that section are expanded to 75 days from the date of accident. In this instance, claimant testified that he was suffering from flu symptoms on February 14, 2001, significant enough to force him to go to his primary care doctor, Dr. Cicero. At that time, claimant was provided Ceftin, 500 milligrams twice a day, and a Medrol Dosepak for his ongoing flu-like symptoms and low back pain. However, claimant's flu symptoms resolved after several days and, on February 24, claimant was referred for an MRI. Claimant met again with Dr. Cicero on March 2, 2001, at which time he was advised of the MRI results and the fact that, in Dr. Cicero's opinion, he should contact his employer. Shortly thereafter, and certainly prior to March 14, 2001, claimant advised Mr. Kiekel of his work-related injury to his low back and claimant was contacted by respondent's workers compensation insurance carrier.

Although not intended as an exhaustive list, factors which may be considered in determining whether just cause exists in a workers compensation claim are:

- (1) The nature of the accident, including whether the accident occurred as a single traumatic event or developed gradually.
- (2) Whether the employee is aware they have sustained either an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent has posted notice as required by K.A.R. 51-12-2.<sup>2</sup>

In this instance, while claimant discussed specific activities which were causing his back to hurt, claimant did not experience a sudden onset of pain, which would have been indicative of a traumatic injury. Rather, he experienced ongoing back pain symptoms, in particular during the evening and night hours, after performing his labors with respondent. Claimant was not aware that he had suffered a specific injury until the MRI results were discussed with him on March 2, 2001. The Board finds that claimant had just cause for failing to provide respondent notice of his accidental injuries alleged through February 13, 2001.

The Board, therefore, finds that the determination by the ALJ that claimant failed to provide just cause for his untimely notice for the injuries occurring on February 12 and February 13, 2001, should be, and is hereby, reversed. Pursuant to the stipulation of the parties, this matter will be remanded to the ALJ for a determination of the remaining issues.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated January 21, 2004, should be, and is hereby, reversed with regard to notice of accident for the alleged accident in February 1998 and with regard to the notice of accident and just cause for the accidents occurring on February 12 and February 13, 2001, but affirmed with regard to claimant's failure to submit timely written claim and timely application for hearing for the injuries suffered in February 1998. The matter is remanded to the Administrative Law Judge for

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<sup>2</sup> *Russell v. MCI Business Services*, No. 201,706, 1995 WL 712402 (Kan. WCAB Oct. 9, 1995).

the determination of the additional issues relating to the February 12 and 13, 2001 accidental injuries suffered while employed with respondent.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Richard C. Wallace, Attorney for Claimant  
Donald P. Herron, Attorney for Respondent and its Insurance Carrier  
Edwin M. Soltz, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director